STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON LEE SMITH,

Defendant-Appellant.

UNPUBLISHED
February 15, 2007

No. 264419
Ingham Circuit Court
LC No. 04-001216-FH

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and aggravated domestic violence, MCL 750.81a(2). He was sentenced to 5 to 20 years' imprisonment for the home invasion conviction and 307 days' imprisonment for the assault conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Before voir dire, defense counsel objected to defendant appearing before the jury in restraints, which consisted of one handcuff attached to a belt restraint. The trial court overruled the objection, commenting that the restraint was very subtle and not noticeable, that defendant could write and communicate with his attorney, and that it was the policy of the trial court to have all criminal defendants who were in custody in restraints while in the courtroom. There was no finding that defendant presented a security or escape risk.

Defendant now argues that the trial court committed error requiring reversal by ruling that defendant's restraints should be left on during trial in the presence of the jury, clearly indicating that defendant was incarcerated and compromising the presumption of his innocence. We disagree. This Court reviews a trial court's decision to restrain a defendant at trial for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

The Sixth Amendment guarantee of the right to a fair trial means that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978). As determined by our Supreme Court, shackling a defendant in the presence of a jury undermines the constitutional presumption of innocence. *People v Dunn*,

446 Mich 409, 425-426; 521 NW2d 255 (1994). Nevertheless, the right of a defendant to appear at trial without any physical restraints is not absolute. *Dixon*, *supra* at 404. A trial court has the authority in controlling the course of a trial to restrain a defendant in the presence of a jury, but only to maintain an orderly trial, to prevent injury in the courtroom, and to frustrate escape. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002); *Dixon*, *supra* at 404.

Because restraints can only be used to prevent injury, frustrate escape, and maintain judicial order, the trial judge in this case clearly erred in failing to remove defendant's restraints, where she stated on the record that she had no information that defendant presented a threat. *Dunn*, *supra* at 425-426; *Dixon*, *supra* at 404-405. Further, the trial judge failed to exercise her discretion when she simply deferred to a court policy of restraining all persons in custody instead of determining whether restraints were required. However, reversal is not required because the error was harmless. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994). Defendant has not identified any portion of the existing record or made a specific offer of proof that he experienced any actual prejudice. In the absence of any record evidence or any such offer of proof of actual prejudice, we decline to review further defendant's claim of prejudice and deny his request for an evidentiary hearing.[1]

Defendant also argues that his convictions for both home invasion with intent to commit domestic assault and aggravated domestic violence violate his constitutional protections against double jeopardy. We disagree. A double jeopardy challenge presents a question of constitutional law, which this Court reviews de novo. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003).

The prohibition against double jeopardy in both the federal and state constitutions protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Id.* at 450. The prohibition against successive prosecutions for the same offense protects the defendant from overreaching by the prosecutor. However, the constitutional prohibition against multiple punishments protects a defendant from being punished more than the Legislature intended. *Calloway*, *supra* at 450-451. The constitutional prohibitions against double jeopardy do not limit the Legislature's power to define crimes and assign punishments. No violation of double jeopardy can occur if the Legislature intended to impose multiple punishments for the same offense. *Calloway*, *supra* at 450-451. The Legislature's intent in permitting multiple punishments is primarily determined by considering the subject, language, and history of the statutes, and the punishments authorized by the statutes. Statutes that address distinct societal norms are separate and permit multiple punishments. *People v Kulpinski*, 243 Mich App 8, 13; 620 NW2d 537 (2000).

[1] Even though we ultimately hold that the trial court's error was harmless, we do not approve of the trial court policy that applies restraints to a defendant in the presence of a jury without a determination that restraints are required by the risk of disruption, injury, or escape. This policy, as presented in this record, clearly violates the rule for using restraints on a defendant in the presence of a jury as articulated in *Dunn*.

This case involves the home invasion statute, MCL 750.110a(9), which provides that "[i]mposition of a penalty under this section does not bar imposition of a penalty under any other applicable law." Thus, the Legislature clearly intended to permit multiple punishments when both the home invasion statute and another statute could apply to the same criminal conduct. *Calloway, supra* at 450-451; *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006). Defendant's convictions did not violate his constitutional protection against double jeopardy because the Legislature explicitly intended to permit convictions of home invasion and any other crime, such as aggravated domestic assault.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio